

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT MASINDI**  
**MISC. APPLICATION NO. 0016 OF 2022**  
(Arising from Civil Appeal No. 39 of 2020)

**MUHORRO TOWN COUNCIL ::::::::::::::::::::::::::::::::::::::: APPLICANT**

**VERSUS**

**RUTALIHAMU JACOB ::::::::::::::::::::::::::::::::::::::: RESPONDENT**

**RULING**

***Before: Hon. Justice Byaruhanga Jesse Ruyyema***

- [1] This is an application filed under the provisions of **S.98 CPA, S.33 of the Judicature Act** and **O.22 r.23** and **O.52 r.1&2 CPR** for orders;
- a) That an order of stay of execution of the judgment and decree in **Civil Appeal No.39 of 2020** be issued pending the hearing and final determination/disposal of the Applicant’s appeal.
  - b) That the costs of this application be provided for.
- [2] The application is by way of Notice of Motion supported by the affidavit of **Kiiza Xavier**, the applicant’s Town Clerk wherein the grounds of the application briefly are as follows;
- a) That judgment in **Civil Appeal No.39 of 2020** was delivered in favour of the Respondent, the applicant is dissatisfied with the judgment and orders therein and has lodged a Notice of Appeal in this Honourable court.
  - b) That there is a serious threat of execution of the decree and orders of this court by the Respondent and that if this application is not granted, the appeal would be rendered nugatory.

- c) That the Applicant's intended appeal to the court of Appeal is meritorious and stands high chances of success.
- d) That the Applicant will suffer substantial loss/irreparable damage if no order of stay of execution is granted pending the outcome of the appeal.
- e) That it is fair and equitable that an order for stay of execution be granted pending the hearing and disposal of the Applicant's appeal.

[3] The application was strongly contested through an affidavit in reply sworn by **Rutalihamu Jacob**, the Respondent which is to the effect that:

- a) The application for stay of execution and the intended appeal has no chances of success but intended to delay him from achieving the fruits of a successful litigation.
- b) That no steps have been taken to execute the orders in **Civil Appeal No.39 of 2020** as mere extracting the decree herein only goes a long way in completion of execution and therefore, that this application is premature.
- c) That there is no imminent threat of execution and that it is not true that the Applicant stands to be prejudiced because the orders of court are that the Respondent herein is entitled to vacant possession of the suit land.

#### **Counsel legal representation**

[4] The Applicant is represented by **Mr. Kawalya Ronald** of the **Attorney General's chambers, Fort portal** while the Respondent is represented by **Mr. Kasangaki Simon** of **M/s Kasangaki & Co. Advocates, Masindi**. They both filed written submissions for this court's consideration in the determination of this application.

### **Background of this application**

- [5] The Respondent sued the Applicant vide **C.S No.26/18** in the Chief Magistrate's court of Hoima at Kagadi for trespass to land, damages and costs of the suit. He averred that he is the lawful owner of the plot of land situate at **Kitoro L.C1 Cell, Muhoro Central, Muhoro Town Council, Kagadi District** measuring approximately 50ft by 170ft which he acquired through lawful purchase from 3 individuals namely; **Israel Lutone, Yosefu Mabiho** and **Karole Rwatooro**.
- [6] In its defence, the Applicant averred that its actions were lawful and were done in execution of its mandated duties under the **Physical Planning Act 2010, the Public Health and Safety laws of Uganda**. It further averred that it is a legal custodian and caretaker of the land in issue which was allocated to the Applicant by the Departed Asians' Property Custodian Board in 2018. The Respondent's suit was dismissed with costs.
- [7] The Respondent filed **Civil Appeal No.39 of 2020** against the Applicant which was decided in favour of the Respondent with orders that that the suit property belonged to the Respondent and the Applicant was a trespasser thereon, an order awarding the Respondent the sum of **Ugx 30,000,000/=** as general damages, **Ugx 5,000,000/=** as punitive damages, costs and **interest of 20% p.a** on damages thereon.
- [8] The Applicant being dissatisfied with the decision and orders of this appellate court has since lodged a Notice of Appeal before this Honourable court showing its intention to appeal to the Court of Appeal against the said decision. At the same time, the Applicant has filed the

present application for stay of execution of the judgment and decree in this court pending the appeal.

[9] The Applicant in its submissions proposed numerous issues for determination of this application but it is my view that the precise and proper issues are those proposed by counsel for the Respondent in view of the provisions of **O.43 r. 2 & 3 CPR** which provides thus:

*“(2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing from the decree, the court which passed the decree may on sufficient cause being shown order the execution to be stayed.*

*(3) No order for stay of execution shall be made... unless the court making it is satisfied;*

*(a) that substantial loss may result to the party applying for stay of execution unless the order is made.*

*(b) that the application has been made without unreasonable delay; and*

*(c) that security has been given by the applicant for the due performance of the decree or order as may ultimately be binding upon him or her.”*

[10] In the instant application therefore, it is my view that the appropriate issues for determination of this application are;

1) Whether there is sufficient cause for grant of an order for stay of execution of the judgment and decree in **Civil Appeal No.39 of 2020.**

2) Whether the Applicant is entitled to the remedies sought.

## **The law applicable**

- [11] The Applicant proceeded under **S.98 CPA, S.33 of the Judicature Act** as enabling provisions of the law and **O.22 r.23 CPR**. I however find that **O.22 r. 23 (1) CPR** provides for when court may stay execution of a decree by the court to which a decree has been sent for execution and it shall, upon sufficient cause being shown, stay the execution of the decree for a reasonable time to enable the judgment debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or execution of the decree, for an order of stay of execution.
- [12] In this case, no decree has been sent to another court or this court for execution. In application of execution, the holder of a decree who desires to execute it, he or she shall apply to the court which passed the decree, or if the decree has been sent under the provisions of **O.22 r. 4 CPR** to another court, then to that court or the proper officer of that other court (**O.22 r.7 CPR**). In this case, the application for stay of execution has been made to the court which passed the decree on appeal.
- [13] In view of the above provisions of the law, it is my view that the instant application ought to have been brought under **O.43 r.4 (2) and (3) CPR**. **Rule 4(2)** provides thus;
- “Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing from the decree, the court which passed the decree may on sufficient cause being shown order the execution to be stayed.”*
- [14] The above notwithstanding, going into the merits of the application, it is well settled law that an Applicant seeking stay of execution must

meet the conditions set out in **O.43 r.4 (3) CPR** as espoused in the case of **Lawrence Musiitwa Kyazze Vs Eunice Busingye S.C.C.A No.18 of 1990** and more pronounced in the Supreme court case of **Hon. Theodore Ssekikuubo & Others Vs A.G & Others, Constitutional Application No. 3/2014** that;

- a) The Applicant must show that he lodged a notice of appeal.
- b) That substantial loss may result to the applicant unless the stay of execution is granted.
- c) That the application has been brought without unreasonable delay.
- d) Whether the Applicant has given security for due performance of the decree or order as may be ultimately be binding upon him.

**1<sup>st</sup> principle: Whether the Applicant has filed a Notice of Appeal.**

[15] On record, there is **annexture "A"** to the affidavit in support of the application deponed by **Kiiza Xavier**, the Town Clerk of the Applicant which is a copy of Notice of Appeal filed in this court on 18/1/2022 showing expression of an intention to file an appeal to the court of appeal against the decision in **Civil Appeal No. 39 of 2020**. The judgment intended to be appealed from was delivered on 13/1/2022 implying that the Notice of Appeal was filed in time. In **A.G Vs E.A Law Society & Another EACJ Application No.1 of 2013** cited with approval in **Equity Bank (U) Ltd Vs Nicholas Were H.C.M.A No. 604/2013**, it was held that;

*"A notice of appeal is a sufficient expression of an intention to file an appeal and that such an action is sufficient to find a basis for grant of stay in appropriate cases."*

[16] From the foregoing, I find that the applicant has fulfilled the 1<sup>st</sup> condition for the grant of stay of execution.

**2<sup>nd</sup> principle: Whether the Applicant is likely to suffer substantial loss unless this application for stay of execution is granted.**

[17] Counsel for the applicant submitted that this honourable court made declarations and orders that the Applicant being a trespasser on the suit land, pay a sum of **Ugx 30,000,000/= as general damages, Ugx as 5,000,000/= punitive damages, costs and interest of 20% per annum.** That the Applicant being a lower Government Unit that depends on local revenue derived from the markets and central Government releases, any protracted execution process may frustrate service delivery to the good tax payers of Muhoro Town Council as a result of irregular cash flows. Lastly, that any wanton eviction of the market vendors who are third parties to this suit occasioning the suit land as a road side market will cause community unrest, economic distress and hinder economic development and social recovery in light of the global covid 19 pandemic.

[18] Surely, I was unable to appreciate counsel for the Applicant's argument. It is as if in any litigation where the Applicant is adjudged in default and loses the suit, the judgment creditor should forfeit or be denied the fruits of his litigation merely because the applicant is a lower Government Unit that depends on local revenue derived from markets and Central Government releases and any protracted execution process may frustrate service delivery to the tax payers! In short, counsel is implying and sending a message that even if the Applicant loses the appeal, no execution ought to take place against the applicant for the above reasons. What counsel for the Applicant is agitating when he submits that,

*“...we implore this Honourable court to grant the Applicant an order of stay of execution in order to avert the looming impasse*

*and for the ends of justice to meet”*

is similar to what the Hon. Justice Kakuru J.A abhorred in **Kyambogo University Vs Prof. Isaiah Omolo Ndiege Civil Application No. 341/2013 (C.A)** at p.15 of the judgment when he observed thus;

*“It clearly appears that the case for the applicant is that if this court does not issue an order of stay of execution **“all hell will break loose”** at Kyambogo University. This court cannot take decisions under threats. This is absolutely unacceptable. This court must make orders that are legal, just and equitable irrespective of what happens outside the courtroom.”*

To buttress his position, he quoted **Marine and General Mutual Life Assurance Society Vs Feltwill Feri Second District Drainage Board [1945] KB 394** where it was held that, execution of a court order would not be stayed simply because its execution would make it impossible for the Respondents to carry out their statutory duty.

[19] Similarly, I find that in this particular case, there is no proof that the Respondent will suffer any loss by complying with the High Court order or will fail to carry out its statutory duty if the order is not stayed. Besides, as was observed in **Tanzania Cotton Marketing Board Vs Cogecot Cotton Co. S.A (1995-1998) E.A 312,**

*“The words substantial loss cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the code expressly prohibits stay of execution as an ordinary rule, it is clear the words “substantial loss” must mean something in addition to and different from that.”*

More, that the applicant should go beyond the vague and general assertions of substantial loss in the event a stay order is not granted.



[20] It follows from the foregoing, that in order to amount to substantial loss, the deprivation must be over and above the ordinary loss resulting from litigation, See **Pan African Insurance Co. (U) Ltd Vs International Air Transport Association H.C.M.A No.86/2006**. The Applicant has not demonstrated that it is likely to suffer substantial loss or that the appeal will be rendered nugatory if the application for stay is not granted.

[21] It is the Applicant who has been found to have trespassed onto the Respondent's suit land and demolished his property hence the **Civil Suit No.26/2018** in the lower court that led to this appeal whose orders are being sought to be stayed. Even when in doubt and court is to consider deciding this application on the balance of convenience, it goes in favour of the Respondent who will incur loss if he doesn't recover and possess back his plot of land and damages as awarded by court. The so called market vendors operating in the suit plot can always be relocated without necessarily affecting the so called cash flows and having them thrown out of the suit land cannot amount to irreparable damage that cannot be atoned by damages. Lastly, the claim that the impending eviction as reflected by the Respondent's letter to police seeking help to throw away the trespassers being illegal is self-defeating. The Applicants having been declared trespassers on the suit land, the Respondent is entitled to evict them in any way and it does not matter who carries out the actual eviction as long as they are acting for and on behalf of the Respondent; As per Wambuzi JSC in **Joy Tumushabe & Anor Vs M/s Angelo African Ltd & Anor S.C.C.A No.7/1990**.

**Principle 3 & 4: Unreasonable delay and payment of security for due performance.**

[22] The other conditions of **unreasonable delay** and **payment of security for due performance** are in favour of the applicant since this application has been filed in less than a month from the date of delivery of the judgment in **Civil Appeal No.39 of 2020** and **O.43 r. 6 CPR** clearly expressly prohibits the applicant from the requirement of security for costs. The issues of whether there is imminent threat of execution or not are in my view, not applicable to the instant application. Those apply to applications for interim orders; See **Kyambogo University Vs Prof. Isaiah Omolo Ndiege (supra)** and **Hwansung Industries Ltd Vs Tajdin Hussein & Ors S.C.Civil Application No.19 of 2008**. Matters to be considered for grant of a substantive application for stay are not necessarily the same in considering application for an interim order for stay pending judgment of the substantive application.

**Whether the Applicant is entitled to the remedies sought**

[23] The justice of this matter weighs in court refusing to grant a stay of execution as the application is devoid of merit. It is apparent that the purpose of this application is merely intended to further delay the matter that has been in the court since 2018 and prevent the Respondent from realizing the fruits of a successful litigation. In the premises, the application is declined and dismissed with costs to the Respondent for no sufficient cause has been shown for stay of execution in **Civil Appeal No.39 of 2020**.

**Dated at Masindi this 6<sup>th</sup> day of May, 2022.**

**Byaruhanga Jesse Ruyema**

**JUDGE.**